No. 3716

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Reply Brief of Plaintiff in Error

JOHN G. BARNES,
Attorney for Plaintiff in Error.

507 Marion Building,
Seattle, Washington.

PRESS OF PLINY L. ALLEN CO., SEATTLE

No. 3716

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Reply Brief of Plaintiff in Error

JOHN G. BARNES,
Attorney for Plaintiff in Error.

507 Marion Building,
Seattle, Washington.

No. 3716

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Reply Brief of Plaintiff in Error

I.

On the Motion of Defendants in Error to Dismiss the Writ of Error.

Rather than consume the time of the court in showing that the argument that the United States Fidelity & Guaranty Company, the surety on the cost bond, should have been made a party defendant

to the Writ of Error, is wholly without foundation, plaintiff in error adopts the speedy method taken by the appellants in the cases of

Roberts vs. Pacific Tel. & Tel. Co., 93 Wash. 233;

Zuhn vs. Horst, 100 Wash. 359, 362;

and here and now comes into court and expressly and explicitly disclaims and waives any right that she might have upon any contingency whatever, to any judgment for costs which she might have against the United States Fidelity & Guaranty Company upon the costs bond filed in the United States District Court for the Western District of Washington, Northern Division, on the 17th day of May, 1920, in cause No. 5225 therein, entitled *The North American Indian, Inc., a corporation, Plaintiff, vs. Edward S. Curtis and Clara J. Curtis, formerly husband and wife, and Curtis Studio, Defendants,* in which said company is the surety, and here and now stipulates and agrees that such costs bond may be held for naught, and forthwith cancelled.

As to Sue Phillips Gates, she was never at any time a party to the action, nor a party to, or in any manner whatsoever, even in the remotest degree, interested in the judgment appealed from.

Section 716 of Remington's Code of Washington, which is a part of the claim and delivery statute, and which I did not print in my opening brief,

provides that if the property which the sheriff takes under the affidavit and bond delivered to him is claimed by any other person than the defendant, or his agent, and such other person makes affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand, indemnify the sheriff against such claim by a bond.

Acting in accordance with this provision of the law, Mrs. Gates filed with the Marshal her affidavit in which she claimed a portion of the property which the Marshal had returned as seized by him under the writ of replevin. The Marshal demanded, and received from the alleged plaintiff an indemnity bond running to him, as provided by the statute, refused to deliver to Mrs. Gates the property claimed by her, and made a return to that effect.

To protect her rights Mrs. Gates had one of several remedies open to her.

Nasser vs. Gaston, 70 Wash. 685.

She could have intervened in the claim and delivery action; she could have brought an action against the Marshal to recover the possession of the property claimed by her, or she could have sued

the marshal for conversion, as was done in *Nasser vs. Gaston,* 70 Wash. 685.

What she did do is not before this court. She did not intervene in the claim and delivery suit, is not party thereto, is not affected by the judgment, and could not be made a party defendant to the writ of error.

Myers vs. Credle, 63 N. C. 504.
Payne vs. Niles, 20 How. 219, 15 L. Ed. 895, 896.

It is claimed that because there was not a formal order or judgment of severance as to Edward S. Curtis the writ of error should be dismissed. In summoning and severing Mr. Curtis plaintiff in error followed the exact procedure approved by this court in the case of *Excelsior Wooden Pipe Co. vs. City of Seattle,* 117 Fed. 140, 143, which ought to be sufficient to dispose of this contention. Counsel say, page 6 of their brief, and repeat it, that there was a refusal by the attorneys only of Mr. Curtis to join in the application for the writ. These statements are unworthy of counsel. The written refusal reads "notice (is) hereby given that the defendant Edward S. Curtis refuses to join in the application for a Writ of Error in the above entitled action." (Record, p. 90.)

In addition to all this, the judgment chal-

lenged by this writ of error is in no sense a joint one. Mr. and Mrs. Curtis appeared separately in the action; he made no defense whatever, but, on the contrary, appeared as a witness for the North American Indian of which he held all but six shares of its capital stock.

Alsop vs. Conway, 188 Fed. 572, and cases cited.

Love vs. Export Storage Co., 143 Fed. 1.

It is submitted that the motion to dismiss should be denied.

II.

At the outset I feel that there are certain statements made in the brief of counsel for defendants in error which should not go unnoticed.

1. On pages 9, 13, 14, 18 and 43 of said brief much is made of the asserted fact that during the trial of the case plaintiff in error, by her attorney, disclaimed any interest in the property involved. In one or two instances attention is called to the fact that this disclaimer was put in the bill of exceptions prepared by plaintiff in error.

The record, pages 75, 76 and 77, discloses everything that was said in that connection. What was there inserted was done so, as counsel well know, at their instance. The bill of exceptions proposed

by plaintiff in error, and lodged with the Clerk, did not contain it, because it was not considered of any importance one way or the other. Counsel for defendant in error proposed it as an amendment to the bill of exceptions, and the court allowed the amendment. When the engrossed bill containing the amendments was prepared it was by inadvertence called the proposed bill of plaintiff in error, instead of the engrossed bill.

What was said occurred after all the evidence had been submitted, the case rested by both parties, and during the argument on the motion to make Pegram and Borglum additional parties. In the course of that argument I had said to the court that the gist of the action was the unlawful detention of the property, and the court asked:

> "What about the necessity of any demand, since you came in and claimed it?"

In answer to this, and some questions interjected by counsel for plaintiff, I stated that in her answer plaintiff in error had not claimed to be the owner of the property, and therein never had claimed to be the owner, all of which is true as shown by her answer, and I further explicitly stated that she was not disclaiming any interest in the property.

2. On page 11 of the brief it is said:

"Before the institution of this suit demand

> was made by the attorney for the defendants in error, upon the daughter, who was the agent of the Curtises and had the property under her charge."

Such assertions are not borne out by the record. The demand, if such it could be called, was made as attorney for and in the name of the North American Indian alone. Pegram and Borglum, the other defendants in error, were not mentioned. Several months before this pretended demand was made the North American Indian had ceased to exist. Therefore, it could not have an attorney.

> *Wamsley vs. Horton,* 34 N. Y. S. 306.
>
> *Austen vs. Columbia Lubricating Co.,* 87 N. Y. S. 497.
>
> *In re. Norwood,* 32 Hun. (N. Y.) 196.

There is literally nothing in the record showing that Miss Curtis was the daughter of Mr. and Mrs. Curtis, or that she was their agent.

3. The statement on page 35 that

> "At that time (the time of the alleged demand in March, or April, 1920) the community existing between plaintiff in error and her former husband had not been finally dissolved by the courts of the State of Washington, and the possession of her former husband—who was the business manager of the community existing between them—would be the possession of the plaintiff in error,"

is neither founded upon the record, nor true in fact.

Passing by the absurdity that a "community" could exist between plaintiff in error and "her *former* husband," the record shows that Mr. and Mrs. Curtis were divorced by a decree of the Superior Court of King County entered on the 24th day of June, 1919. The record further shows (pp. 115, 117) that Mr. Curtis did not appeal from the decree of divorce, but only from that part of it disposing of the property of the parties. The moment the decree of divorce was entered the marital "community" composed of Mr. and Mrs. Curtis was dissolved with the marriage relation, because it has, and cannot possibly have, any existence separate and apart from husband and wife.

Even if Mr. Curtis had appealed from the decree of divorce, such appeal would not have vacated, or in the slightest degree affected the validity of the dissolution of the marriage tie.

Masterson vs. Ogden, 78 Wash. 644, 647.

So the truth is, that at the time of the pretended demand, and for at least nine months immediately preceding that time, a "community" did not exist. The supersedeas bond given by Mr. Curtis effectually prevented Mrs. Curtis from taking possession of, or exercising any control whatsoever over the property awarded her by the decree of the

Superior Court. Under that bond Mr. Curtis was in sole adverse possession thereof.

State ex rel. Schloss vs. Superior Court, 3 Wash. 696.

II.

The claim is made, pages 16 and 17 of the brief, that sureties on a replevin bond are estopped to set up that the bond was not properly accepted, approved, or filed, *as provided by statute,* after the property has been placed in the possession of the principal obligor on the bond.

In this case the property was never placed in the possession of the North American Indian. It was a physical impossibility to do so,because that company was dead. Pegram and Borglum are not in any way parties to the bond, or any bond, nor does the surety obligate itself to make good any act or dereliction of theirs. The record shows that the Marshal at all times kept possession of the property he seized. Indeed, on page 11 of the brief the statement is made:

> "The property (was) taken from their possession by the United States Marshal, who held the same in his possession and deposited it in room 64 Cobb Building, in Seattle, Washington, in charge of his deputy, one 'Slade,' pending the disposition and trial on the issues."

Under the statute (Sec. 711, Brief of Plaintiff

in Error, p. 29) it was the duty of the Marshal to deliver the property to the plaintiff after three days from the time of service of affidavit and bond. He could not do that because there wasn't any plaintiff to deliver it to.

The cases cited in this connection fully bear out the contention, and cases cited, by plaintiff in error. Take the first case cited, *Hartlep vs. Cole,* 120 Ind. 247, 22 N. E. 130. Therein the court says:

> "It is too late for appellants, after having executed the replevin bond, and obtained possession of the property, to set up as a defense to the action that the statutory provisions in regard to the *execution* of the bond were not technically complied with. The law of estoppel will not allow such an unconscionable defense. But, *the bond having been delivered to the sheriff, and he, acting upon such delivery,* turned the property over to the appellant Hartlep, it constituted an acceptance and approval of the bond."

In the case at bar neither the affidavit, nor the bond, were ever delivered to the Marshal, and he never acted thereon. What he acted upon and what he made his return upon—notwithstanding the statute (Sec. 717, p. 30, Brief of Plaintiff in Error) expressly required him to file *the affidavit,* with the proceedings thereon, with the clerk of court—was an utterly void writ of replevin, void because the court was without jurisdiction to issue it. The

case at bar is on all fours with *Hicks vs. Mendenhall,* 17 Minn. 475. Counsel says that in that case, and in the Connecticut case, the writs were void because the courts who issued them were without jurisdiction so to do, but that the District Court had jurisdiction to issue the writ in the case at bar. Why did not the Minnesota court have jurisdiction to issue the writ of replevin? Because the statute did not provide for its issuance; because the statute provided identically the same as the statute of Washington provides, that the affidavit and bond should be delivered to the sheriff, constituted his process, for the form and sufficiency of which he, and he alone, was responsible. The District Court had just as much jurisdiction to issue the writ of replevin in this case, and no more, as did the Minnesota court in that case—which wasn't any.

It is said that an examination of the bond in this case discloses the fact that it was given to procure a delivery of the property, not to procure a writ of replevin. It is true that the bond (Record p. 17) recites that

> "Whereas, the said plaintiff being desirous of having the said personal property delivered to it, *has delivered to the United States Marshal of the Western District, Northern Division, the proper affidavit, and required him to take the said property from said defendants;"*

it is also true that the italicised part of that recital

is false. The order of the court directing the issuance of the writ of replevin recites that it is made, among other reasons, because the "plaintiff has furnished good and sufficient bond," inasmuch as the court had theretofore usurped the rights and powers of the Marshal and approved the bond, I still stick to my original statement that the bond was given to procure the writ of replevin, and for no other purpose.

In view of the contemptuous reference to the applicability of *B. & O. R. Co. vs. Hamilton,* 16 Fed. 181, I would most respectfully ask the court to read the whole of the short opinion in that case. If it will do so it will be in a position to judge of the accuracy and reliability of the statement of counsel that

> "An examination of the Virginia case discloses the fact that there is no provision in the law of the State of Virginia which permits an action *either of claim and delivery* or of replevin. *It was for this reason that the writ of replevin was dismissed.*"

III.

Upon the question of error claimed in adding Pegram and Borglum as plaintiffs the attention of the court is especially invited to *Davis vs. Seattle,* 37 Wash. 223, and a long excerpt from that case printed. In that case the husband was not made a

party plaintiff after all the evidence was in on both sides, without any evidence as to him, and without any issues made as to him. It was disclosed by the evidence offered by plaintiff that she was a married woman. Defendant made a motion for non-suit because the husband was not a party plaintiff. The opinion says:

> "Prior to any ruling on this motion for judgment, the respondent Alice J. Davis, then the sole plaintiff, moved the court for leave to amend the complaint, by making her husband, B. W. Davis, a party plaintiff. This motion was granted, *an amended complaint was filed,* and the husband, B. W. Davis, being present, appeared by his attorney, submitted himself to the jurisdiction of the court, and agreed to abide its decision."

In this case the sole plaintiff, North American Indian, which the affirmative proof of plaintiff in error had shown was non-existent, after both parties had rested their case, made a motion for an instructed verdict in its favor. There was not a scintilla of evidence at that time, or thereafter, that Pegram and Borglum were in any way interested. The North American Indian did not move that its complaint be amended by adding Pegram and Borglum. On the contrary, those gentlemen, entire strangers to the record, asked that they be added as plaintiffs. In short, they were seeking to intervene in the action, but without complying with sec-

tions 202 and 203 of Remington's Code of Washington, which provide for, and regulate intervention. Under those provisions when a stranger has been granted leave to intervene he must serve a copy of his complaint upon the parties to the action, who may answer or demur to it, and trial had on the issues made thereby. It is also provided that no intervention shall be cause for delay in the trial of an action between the original parties thereto.

Say counsel for defendants in error:

> "At the time of trial she (plaintiff in error) did not claim surprise, nor ask for time in which to meet any additional issue which this action of the court could possibly have injected into the case."

In view of the fact that no additional issue was made by Pegram and Borglum it is hard to see how plaintiff in error could have asked for time to meet that which was non-existent.

It is difficult to follow the reasoning of counsel on this question. They say:

> "We do not believe, and never have felt, that it was necessary under the circumstances of this case for these men to have been made parties."

Nevertheless, the judgment which the writ of error in this case challenges, declares that Pegram, Borglum, and the dead corporation, are jointly the

owners of, and entitled to the possession of a large and valuable amount of property; that they are jointly given the option to return to the trade name "Curtis Studio," certain other property of unknown value which counsel in their brief admit the Marshal seized without any semblance of right or authority, or pay to Mr. and Mrs. Curtis jointly the munificent sum of $9.50, and thereby become the joint owners of such property.

Counsel say that the reason it was unnecessary to make Pegram and Borglum parties was because plaintiff in error

1. Was estopped to deny the existence of the North American Indian by reason of business dealings of great magnitude between the corporation and plaintiff in error and her former husband. Even if such business dealings were established, which we deny, we cannot understand how they would work an estoppel preventing Mrs. Curtis from denying the existence of the corporation at the time it alleges she committed a tort against it by unlawfully denying it possession of its property. Estoppel by business dealings refer only to the time of such transactions, and on account of which the one party is put in a worse position than before. Even if plaintiff in error had received property from the North American Indian after the expiration of its

existence, she would be estopped to deny her responsibility for the property, but she would not be estopped to deny that the company was without capacity to sue her therefor.

Krutz vs. Paola Town Co., 20 Kan. 397.

The North American Indian has never claimed that plaintiff in error ever wrongfully, or otherwise, took or received any of its property.

In their argument counsel lose sight entirely of the fact that in this case the jurisdiction of the District Court depended upon the fact of whether or not it was a citizen of the State of New York, as alleged in its complaint. The law is that the fact that both the North American Indian, and plaintiff in error, might, on account of business dealings between them, be estopped to deny the corporate existence, would not make the North American Indian a citizen of the State of New York, so as to give the District Court of Washington jurisdiction of this action on the ground of diverse citizenship. In order to be a citizen of the State of New York the North American Indian must be a corporation *de jure* under its laws.

Gastonia Cotton Mfg. Co. vs. W. L. Wells Co., 128 Fed. 369.

In short, citizenship cannot be created by estoppel.

Furthermore, the law is well settled that even if plaintiff in error had contracted with the North American Indian during its existence, and the suit was upon such contract, she would not be estopped to show that it had been dissolved by the expiration of the duration of its existence.

Bank of U. S. vs. McLaughlin's Admnr., 2 Cranch C. C. 20;

Clark vs. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083;

Bank of Galliopolis vs. Trimble, 6 B. Mon. (Ky.) 599.

2. That by her answer she had foreclosed herself of the right to question the existence of the North American Indian. In this connection counsel say that "Under all the authorities the denial generally of the existence of a corporation, admits such corporate existence." Such is not the fact. The following cases all hold that just such a denial as plaintiff in error made in her answer in this case raises the issue of corporate organization and existence.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579;

Roberts vs. Langenbach, 119 Fed. 349;

Yocum vs. Parker, 130 Fed. 770;

Toledo Traction Co. vs. Cameron, 137 Fed. 48;

Cole vs. Carson, 153 Fed. 278;

Lindsay-Bitton Live Stock Co. vs. Justice, 191 Fed. 163.

In this last case the denial of corporate citizenship was in the exact words of the answer of plaintiff in error in this case. The court held that this denial put in issue plaintiff's allegation of diverse citizenship of the parties, and imposed upon him the obligation and indispensable duty of proving that allegation.

In Vol. 4, *Fletcher Cyclopedia Corporations,* page 4621, it is said:

> "but the general denial or the denial in general negative terms introduced by the codes is a more extensive pleading than was the general issue, and the general rule accordingly is that in the code system, and its likes, the issue may be presented by a denial fully responding to the allegations of existence in the complaint."

In addition, it is claimed:

1. In the absence of proof to the contrary, the extension of the corporate existence must be presumed. Such is not the law.

Yankton Nat. Bank vs. Benson, 33 S. D. 399, 146 N. W. 582, 584.

Moreover, plaintiff in error proved affirmatively by the witness Albert that in the latter part of August, 1920, he and two others, had executed and

filed with the Secretary of State of the State of New York a certificate of incorporation of a corporation with the identical name of the plaintiff corporation, and this court will take judicial notice of the law of the State of New York which prohibits the Secretary of State from filing such certificate with duplicate name, if the old corporation was still in existence. In addition to all this the court adjourned the trial four days to enable counsel to show an extension of the existence of the corporation if they could do so, telling them that they could get it by telegraph.

2. That whether or not a corporate charter has expired by limitation is a question which cannot be adjudicated in a collateral proceeding, that it can only be raised in a direct proceeding between the sovereign power and the corporation.

In Vol. I., *Fletcher Cyclopedia Corporations,* page 577, it is said:

> "By weight of authority, however, a corporation is dissolved and ceases to exist when its charter expires, unless there is some statutory provision to the contrary, for there is no longer any law under which it can exist, and therefore it cannot, after expiration of its charter, be a corporation either de jure or de facto. According to this view, its right to exercise corporate powers, including the right to sue as a corporation, may be questioned collaterally."

This statement is amply fortified by citations from decisions of the courts of the United States, Indiana, Kansas, Michigan, Missouri, New York, Tennessee and Virginia.

In the given Missouri case, *Bradley vs. Reppell,* 133 Mo. 545, 34 S. W. 841, 32 S. W. 645, it is pointed out that the statement to the contrary in *St. Louis Gaslight Co. vs. St. Louis,* 84 Mo. 202, cited and relied upon by defendants in error, is dictum, and hence not controlling.

3. That the North American Indian introduced evidence to show at least *prima facie* the existence of the corporation. We claim that it made no such showing, but however that may be, it was utterly refuted and destroyed by the affirmative proof introduced by plaintiff in error.

4. That the proof showed that in any event the North American Indian was a de facto corporation, because it had been functioning as such since December, 1919, and as such was entitled to sue and be sued.

The proof necessary to show a de facto corporation was entirely wanting.

Milwaukee Gold Extraction Co. vs. Gordon, 37 Mont. 209, 95 Pac. 995.

Continuing to do business after the expiration

of its existence, even if it had done so, of which there is no proof, would not enable it to maintain this action.

Clark vs. American Cannel Coal Co., 165 Ind. 213, 73 N. E. 1083;

Bradley vs. Reppell, 133 Mo. 545, 34 S. W. 841, 32 S. W. 645.

Nor would the fact that it was a de facto corporation make it a citizen of the State of New York. It would of necessity have to be de jure a corporation to be that.

Gastonia Cotton Mfg. Co. vs. W. L. Wells Co., 128 Fed. 369.

Respectfully submitted,

JOHN G. BARNES,

Attorney for Plaintiff in Error.